

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SIA HENRY, *et al.*, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

BROWN UNIVERSITY, *et al.*,

Defendants.

Case No.: 22-cv-00125

Hon. Matthew F. Kennelly

JOINT STATUS REPORT

The Parties submit this Joint Status Report pursuant to the Court’s following order: “The parties are directed to file a status report on 2/10/2023 setting out what remaining issues identified in the parties’ previous status reports and motions have not yet been ruled upon. This should include a cross reference to the previous submission(s). No further briefing or argument is authorized unless the Court specifically requests it hereafter.” Dkt. 315.

I. PLAINTIFFS’ POSITION ON REMAINING ISSUES THAT HAVE NOT YET BEEN RULED UPON

The three remaining issues from the prior Joint Status Report (Dkt. 274), in which Plaintiffs sought “the Court’s guidance” to “facilitate the diligent resolution of these issues” by January 27, 2023, concern (1) designating a custodian from the Presidents and Development Office from the Defendants who did not drop the exemption defense (*id.* at 3-7); (2) discovery of documents and communications created after the filing of the Complaint, on January 9, 2022 (*id.* at 14-16); and (3) Defendants’ use of Technology-Assisted Review (TAR) in discovery (*id.* at 17, 21).

Designating Custodians from the President's Office and Development Office from Defendants Not Dropping the Section 568 Exemption Defense

Plaintiffs have requested that the Court order that Defendants (excepting Caltech) designate custodians from their President's Office and Development Office Custodians. *Id.* at 3-7. After the hearing on February 8, 2023, the Court ruled that:

The Court has declined for now to require *objecting defendants* to designate custodians from their president's and development offices. This is without prejudice to consideration of this issue later based on a more complete record as described during the hearing

(Dkt. 315) (emphasis added).

The Court did not address the other Defendants. Plaintiffs ask the Court to resolve whether the Defendants who did not drop the 568 Exemption defense (excepting Caltech) should designate appropriate custodians of documents from its President's Office and Development Office;

Documents and Communications Post-January 9, 2022

The parties have met and conferred several times on this issue and have come to an agreement that Defendants will produce their non-privileged communications (internally and with third parties, such as lobbyists) in the period leading up to the expiration of the 568 Exemption on September 30, 2022, and the dissolution of the 568 Presidents Group on November 4, 2022. The parties have also agreed that Defendants will produce structured data concerning the awards of financial aid created after the filing of the Complaint and after the expiration of the 568 Exemption.

Plaintiffs ask the Court, however, to resolve the following issues:

1. Whether Defendants should produce structured data concerning awards of financial aid through the end of this calendar year. Plaintiffs have asked Defendants to produce such data so as to include the results of Defendants' early action and early decision admissions, which generally will have been resolved by the end of December 2023, and to produce such data by February 15, 2004.

2. Whether Defendants should produce structured data concerning Defendants' admissions decisions through the end of this calendar year. Plaintiffs have asked Defendants to do so.
3. Whether Defendants should produce non-structured data concerning their policies and practices relating to financial aid and admissions, including any changes thereto, since the filing of the Complaint. Plaintiffs have asked Defendants to produce non-structured data, documents, and communications bearing on these policies and practices, including donor-related applicant information, created through the date of dissolution of the 568 Presidents' Group plus one year—that is, to November 4, 2023.

A further issue, related to the foregoing issues on whether Defendants should produce documents created after the filing of the Complaint responsive to Plaintiffs' revised Requests for Production to be served on Defendants by February 14, 2023, pursuant to the Court's Order on February 8, 2023. Dkt. 315.

Technology-Assisted Review (TAR)

The parties have also met and conferred several more times since the last Joint Status Report to discuss Defendants' proposed use of Technology-Aided Review ("TAR") software. There are two primary areas of disagreement remaining.

The first area concerns target recall rate. Recall is a measure of the percentage of responsive documents in a data set that have been correctly classified by the TAR/predictive coding algorithm. When recall reaches 100%, the algorithm has correctly identified all responsive documents in a collection. A recall rate can be achieved through an iterative process, the length of which is determined by the quality of the initial algorithm training process. Plaintiffs believe the target recall rate should be at least 85%, which translates to a false negative rate of 15%. A recall rate of

70% translates to a false negative rate of 30%.

The second area concerns the use of applying search terms before applying TAR methods. The parties disagree over whether it is appropriate to use search terms, which also miss relevant documents, to “pre-cull” Defendants’ documents prior to applying TAR methods to exclude documents. Plaintiffs disagree with such an approach.

II. DEFENDANTS’ POSITION

There are no issues that were ripe in the January 13, 2023, Joint Status Report that remain outstanding following the Court’s Order on February 8, 2023. As to the issue of Development Office and President’s Office custodians raised in the January 13 Joint Status Report, *see* ECF No. 274 at 21-30, Plaintiffs are mistaken that this issue remains open. The Court clearly denied Plaintiffs’ request in the February 8 Order when stating: “With regard to the joint status report filed on 1/13/2023 [274]: (a) The Court has declined for now to require objecting defendants to designate custodians from their president's and development offices.” ECF No. 315. The Court’s ruling was not limited to the six Defendants dropping the exemption.

As to the issues that both parties agreed were not ripe on January 13, *see* ECF No. 274 at 14-18, 31-32, and 40, the parties have now resolved their dispute regarding search terms, subject to school-specific negotiations and changes to Plaintiffs’ RFPs, and also have made progress towards reaching resolution on post-January 9, 2022, discovery. The post-January 9, 2022, discovery issues are not all ripe at this time. In fact, Plaintiffs have agreed to meet-and-confer again next week after they provide Defendants with a reduced set of RFPs per the Court’s February 8 Order. The parties have also narrowed the issues in dispute as to the use of Technology Assisted Review (TAR).

Defendants have not previously had the opportunity to explain their position on these issues

to the Court, and Plaintiffs' characterization of the agreements reached and areas of remaining dispute is incomplete and inaccurate. Further, Defendants understood the February 8 Order to bar further substantive discussion of these issues at this time. Defendants believe that entry of Plaintiffs' proposed order would therefore be premature and also provide relief inconsistent with the parties' negotiations. As to any issue Plaintiffs believe is ripe now, Defendants submit that Plaintiffs should file a motion to compel, to which Defendants will then respond. Should the Court wish the parties to address their disputes in some other fashion, such as through the submission of a joint status report or otherwise, Defendants will of course do so.

Dated: February 10, 2023

Respectfully submitted,

By: /s/ Edward J. Normand

Devin "Vel" Freedman
Edward J. Normand
Peter Bach-y-Rita
FREEDMAN NORMAND
FRIEDLAND LLP
99 Park Avenue
Suite 1910
New York, NY 10016
Tel: 646-970-7513
vel@fnf.law
tnormand@fnf.law
pbachyrita@fnf.law

/s/ Robert D. Gilbert

Robert D. Gilbert
Elpidio Villarreal
Robert S. Raymar*
Sarah Schuster
Alexis Marquez
Steven Magnusson
GILBERT LITIGATORS &
COUNSELORS, P.C.
11 Broadway, Suite 615
New York, NY 10004
Phone: (646) 448-5269

By: /s/ Kenneth Kliebard

Kenneth Kliebard
MORGAN, LEWIS & BOCKIUS LLP
110 North Wacker Drive
Suite 2800
Chicago, IL 60606-1511
Tel: 312-324-1000
kenneth.kliebard@morganlewis.com

Jon R. Roellke
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541
Tel: 202-739-5754
jon.roellke@morganlewis.com

Sujal Shah
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower, 28th Floor
San Francisco, CA 94105-1596
Tel: 415-442-1386
sujal.shah@morganlewis.com

Counsel for Defendant Brown University

By: /s/ Deepti Bansal

rgilbert@gilbertlitigators.com
pdvillarreal@gilbertlitigators.com
rraymar@gilbertlitigators.com
sschuster@gilbertlitigators.com
amarquez@gilbertlitigators.com
smagnusson@gilbertlitigators.com

* *Pro hac vice*

Eric L. Cramer
Caitlin G. Coslett
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel: 215-875-3000
ecramer@bm.net
ccoslett@bm.net

Daniel J. Walker
Robert E. Litan
Hope Brinn
BERGER MONTAGUE PC
2001 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20006
Tel: 202-559-9745
rlitan@bm.net
dwalker@bm.net
hbrinn@bm.net

Counsel for Plaintiffs

Deepti Bansal
Alexander J. Kasner
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004-2400
Tel: 202-728-7027
dbansal@cooley.com
akasner@cooley.com

Matthew Kutcher
COOLEY LLP
110 N. Wacker Drive
Chicago, IL 60606
Tel: 312-881-6500
mkutcher@cooley.com

*Counsel for Defendant California Institute of
Technology*

By: /s/ James L. Cooper
James L. Cooper
Michael Rubin
Tommy La Voy
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001-3743
Tel: 202-942-5014
james.cooper@arnoldporter.com
michael.rubin@arnoldporter.com
tommy.lavoy@arnoldporter.com

Leah Harrell
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Tel.: 212-836-7767
Leah.Harrell@arnoldporter.com

Valarie Hays
ARNOLD & PORTER KAYE SCHOLER LLP
70 W Madison Street
Suite 4200
Chicago, IL 60602
Tel.: 312-583-2440
valarie.hays@arnoldporter.com

Counsel for Defendant University of Chicago

By: /s/ Amy Van Gelder

Patrick Fitzgerald

Amy Van Gelder

SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP

155 N. Wacker Drive

Chicago, IL 60606-1720

Tel: 312-407-0508

patrick.fitzgerald@skadden.com

amy.vangelder@skadden.com

Karen Hoffman Lent

SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP

One Manhattan West

Room 40-216

New York, NY 10001-8602

Tel: 212-735-3276

karen.lent@skadden.com

*Counsel for Defendant The Trustees of
Columbia University in the City of New York*

By: /s/ Norm Armstrong

Norm Armstrong

Christopher Yook

KING & SPALDING LLP

1700 Pennsylvania Avenue, NW

Suite 200

Washington, D.C. 20006

Tel.: 202-626-8979

narmstrong@kslaw.com

cyook@kslaw.com

Emily Chen

KING & SPALDING LLP

1185 Avenue of the Americas

34th Floor

New York, NY 10036

Tel: 212-556-2224

echen@kslaw.com

Zachary T. Fardon

KING & SPALDING LLP
110 N Wacker Drive
Suite 3800
Chicago, IL 60606
312 764 6960
zfardon@kslaw.com

Counsel for Defendant Cornell University

By: /s/ Terri L. Mascherin
Terri L. Mascherin
Reid J. Schar
JENNER & BLOCK LLP
353 N. Clark Street,
Chicago, IL 60654-3456
Tel: 312-222-9350
tmascherin@jenner.com
rschar@jenner.com

Ishan K. Bhabha
Douglas E. Litvack
Lauren J. Hartz
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001-4412
Tel: 202-637-6327
ibhabha@jenner.com
dlitvack@jenner.com
lhartz@jenner.com

Counsel for Defendant Trustees of Dartmouth College

By: /s/ James A. Morsch
James A. Morsch
Jim.morsch@saul.com
SAUL EWING ARNSTEIN & LEHR
161 North Clark, Suite 4200
Chicago, IL 60601
Telephone: (312) 876-7100
Facsimile: (312) 876-0288
IL Attorney ID #6209558

Christopher D. Dusseault (pro hac vice)
cdusseault@gibsondunn.com

Jacqueline L. Sesia
jsesia@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000

Counsel for Defendant Duke University

By: /s/ Tina M. Tabacchi
Tina M. Tabacchi
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60601-1692
Tel.: 312-782-3939
tmtabacchi@jonesday.com

Craig A. Waldman
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
Tel.: 202-879-3877
cwaldman@jonesday.com

Counsel for Defendant Emory University

By: /s/ Britt M. Miller
Britt M. Miller
Daniel T. Fenske
Jed W. Glickstein
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Tel: 312-783-0600
bmiller@mayerbrown.com
dfenske@mayerbrown.com
jglickstein@mayerbrown.com

Counsel for Defendant Georgetown University

By: /s/ Jeffrey J. Bushofsky
Jeffrey J. Bushofsky
ROPES & GRAY LLP
191 North Wacker Drive 32nd Floor
Chicago, IL 60606-4302

Tel: 312-845-1200
jeffrey.bushofsky@ropesgray.com

Chong S. Park
Samer M. Musallam
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006-6807
Tel: 202-508-4600
chong.park@ropesgray.com
samer.musallam@ropesgray.com

*Counsel for Defendant Johns Hopkins
University*

By: /s/ Jan Rybnicek
Eric Mahr
Jan Rybnicek
Daphne Lin
FRESHFIELDS BRUCKHAUS DERINGER
700 13th Street, NW
Washington, DC 20005
Tel: 202-777-4500
eric.mahr@freshfields.com
jan.rybnicek@freshfields.com
daphne.lin@freshfields.com

*Counsel for Defendant Massachusetts Institute
of Technology*

By: /s/ Scott D. Stein
Scott D. Stein
Benjamin R. Brunner
Kelsey Annu-Essuman
SIDLEY AUSTIN LLP
1 South Dearborn Street
Chicago, IL 60603
Tel.: 414-559-2434
sstein@sidley.com
bbrunner@sidley.com
kannuessuman@sidley.com

*Counsel for Defendant Northwestern
University*

By: /s/ Robert A. Van Kirk

Robert A. Van Kirk
Cole T. Wintheiser
Jonathan Pitt
Matthew D. Heins
Sarah F. Kirkpatrick
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Tel: 202-434-5163
rvankirk@wc.com
cwintheiser@wc.com
jpitt@wc.com
mheins@wc.com
skirkpatrick@wc.com

James Peter Fieweger
MICHAEL BEST & FRIEDRICH LLP
444 West Lake Street
Suite 3200
Chicago, IL 60606
Tel.: 312-222-0800
jpfieweger@michaelbest.com

*Counsel for Defendant University of Notre
Dame du Lac*

By: /s/ Seth Waxman
Seth Waxman
WILMER CUTLER PICKERING HALE
AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
Tel: 202-663-6800
seth.waxman@wilmerhale.com

David Gringer
Alan Schoenfeld
WILMER CUTLER PICKERING HALE
AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Tel: 212-937-7294
david.gringer@wilmerhale.com
alan.schoenfeld@wilmerhale.com

Daniel Martin Feeney
Edward W. Feldman
MILLER SHAKMAN LEVINE & FELDMAN
LLP
180 North LaSalle Street
Suite 3600
Chicago, IL 60601
Tel.: 312-263-3700
dfeeney@millershakman.com
efeldman@millershakman.com

*Counsel for Defendant The Trustees of the
University of Pennsylvania*

By: /s/ Norm Armstrong
Norm Armstrong
Christopher Yook
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, D.C. 20006
Tel.: 202-626-8979
narmstrong@kslaw.com
cyook@kslaw.com

Emily Chen
KING & SPALDING LLP
1185 Avenue of the Americas
34th Floor
New York, NY 10036
Tel: 212-556-2224
echen@kslaw.com

Zachary T. Fardon
KING & SPALDING LLP
110 N Wacker Drive
Suite 3800
Chicago, IL 60606
312 764 6960
zfardon@kslaw.com

*Counsel for Defendant William Marsh Rice
University*

By: /s/ J. Mark Gidley
J. Mark Gidley

WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005-3807
Tel: 202-626-3600
mgidley@whitecase.com

Robert A. Milne
David H. Suggs
WHITE & CASE LLP
1221 Avenue of the Americas
New York, NY 10020-1095
Tel: 212-819-8200
rmilne@whitecase.com
dsuggs@whitecase.com

Counsel for Defendant Vanderbilt University

By: /s/ Charles A. Loughlin
Charles A. Loughlin
Benjamin F. Holt
Jamie Lee
Molly Pallman
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004-1109
Tel: 202-637-5600
chuck.loughlin@hoganlovells.com
benjamin.holt@hoganlovells.com
jamie.lee@hoganlovells.com
molly.pallman@hoganlovells.com

Stephen Novack
Stephen J. Siegel
Serena G. Rabie
NOVACK AND MACEY LLP
100 North Riverside Plaza, 15th Floor
Chicago, IL 60606-1501
Tel.: 312-419-6900
snovack@novackmacey.com
ssiegel@novackmacey.com
srabie@novackmacey.com

Counsel for Defendant Yale University